

**Pisciotti v County of Wayne**

2009 NY Slip Op 31511(U)

July 8, 2009

Supreme Court, Wayne County

Docket Number: 65613/2008

Judge: Daniel J. Doyle

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## STATUTE OF LIMITATIONS

The Sheriff met with James A. Marquette, County Administrator for Wayne County, on February 25, 2008 to discuss the subject of the Sheriff's claim to longevity payments. At that time, Mr. Marquette claims to have denied the request, but was also to reconsider this determination.<sup>1</sup> On March 7, 2008, Mr. Marquette sent a letter to the Sheriff:

This is a follow up to our discussions of February 25, 2008. We have again reviewed the documentation that is in place regarding longevity payments for elected officials. It is your belief that elected officials should receive longevity payments and your contention that you should not have to contribute toward health insurance costs while you are actively serving as Sheriff. We have determined that the resolutions that are in place do not support your request.

The Respondent argues that the Statute of Limitations began to run on February 25, 2008. The Petitioner argues that the Statute of Limitations began to run when the letter was sent on March 7, 2008.

An Article 78 proceeding that is in the nature of a mandamus to review must be commenced within four months after the determination to be reviewed becomes "final and binding" ( *CPLR 217[1]* See also *In the Matter of Larry Dahn v. Cornelius Keane, as Commissioner of Fire for City of Buffalo, et al* 1 AD3d 1038 [4<sup>th</sup> Dept. 2003]).) The Court of Appeals has identified two requirements for determining the time when an action is "final and binding upon the petitioner." First, a definitive position on the issue that inflicts actual, concrete injury must have been reached and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available

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<sup>1</sup>It appears that these were oral discussions not reduced to writing

to the complaining party. (*Best Payphones, Inc. v. Department of Information Technology and Telecommunications of City of New York* 5 N.Y.3d 30, 34 [2005]).

In an earlier Court of Appeals case, *Essex County v. Zagata*, (91 N.Y.2d 447, 453 [1998]), the Court enunciated the standard stating: "To determine if agency action is final, therefore, consideration must be given to 'the completeness of the administrative action' and 'a pragmatic evaluation [must be made] of whether the 'decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury' (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 519, cert denied 479 US 985, quoting *Williamson County Regional Planning Commn. v Hamilton Bank*, 473 US 172, 192-193; *Matter of Edmead v McGuire*, 67 NY2d 714, 716 [a "challenged determination is final and binding when it 'has its impact' upon the petitioner who is thereby aggrieved"]; see also, *Abbott Labs. v Gardner*, 387 US 136, 148-149; *Federal Trade Commn. v Standard Oil Co. of Cal.*, 449 US 232, 239; That Court also cited a federal court case entitled *National Treasury Empls. Union v Federal Labor Relations Auth.*, 712 F2d 669, 671 [DC Cir] [**an agency's position will not be considered final if it is "tentative, provisional, or contingent, subject to recall, revision, or reconsideration"**]) *Essex County v. Zagata*, (91 N.Y.2d 447, 453 [1998] (emphasis added).

The Court finds that a final determination was made by the March 7, 2008 letter, therefore the Petitioner's claim was timely made.

## ENTITLEMENT TO LONGEVITY PAYMENTS/INCREMENTS

### A. First Cause of Action seeking longevity increments totaling \$93,447 pursuant to the "applicable" collective bargaining agreement in violation of County Law 201 .

Petitioner has been the Sheriff of Wayne County since 1983. He is an elected County Official (See N.Y. Constitution Art. XIII §13 [a]) and it is not controverted that his salary is set by the Board of Supervisors.

The Court has reviewed the three collective bargaining agreements submitted by the Respondent covering periods of time from January 1, 1995 to December 31, 2000 and January 1, 2006 to December 31, 2010. No other contracts were submitted by either party.

The first contract is attached as Exhibit "F" to Respondent's motion papers and is entitled "Contract Between The County of Wayne, New York and Wayne County Sheriff's Employees Association, January 1, 1995 - December 31, 1997." The list of specifically covered employees does not include the Sheriff. Additionally, the agreement excludes any subsequently created positions for employees who, like the Sheriff, report to the Board of Supervisors or is confidential or managerial. The language included in the contract for the period January 1, 1998 through December 31, 2000, attached as Exhibit "G" to Respondent's motion papers, is identical to the earlier contract.

The current contract is attached as Exhibit "E" to Respondent's motion papers and is entitled "Contract between Wayne County and the Civil Service Employees

Association, Inc., Wayne County Local 859, Wayne County General Employees Unit 9100-02. January 1, 2006 - December 31,2010." That contract specifically excludes the Sheriff stating:

Section 1 : The County hereby recognizes the Association as the sole and exclusive negotiating agent for all employees of the County **excluding elected and appointed officials, [and] Department Heads...**" (Emphasis added).

The Court finds that the Petitioner is not a covered employee under the collective bargaining agreements. Therefore he not entitled to any longevity or increments provided to employees who are subject to that agreement.

B. Second Cause of Action seeking longevity increments totaling \$93,447 pursuant to the Resolutions of the Board of Supervisors including those authorizing longevity increments to Managerial (Heads of Departments).

The Court has reviewed the following resolutions made by the Board of Supervisors:

Resolution 92-76  
Resolution 724-89  
Resolution 518-93  
Resolution 498-01 .

The Sheriff also submitted a portion of Policy and Procedure Manual referring to Resolution 92-76 as modified by 724-89 and 518-93 in support of his position. <sup>2</sup>

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<sup>2</sup>Originally Petitioner represented in this August 5, 2008 affidavit that the exhibit was resolution 518-93, upon clarification from the Respondent he conceded that it was part of the county's policy and procedures manual.

Although the Court gave Petitioner additional time to submit additional resolutions or other material in support of his claim, the only additional material submitted was a copy of a proposed Resolution number 231 (81) which was tabled by the board and never adopted.

The Court finds that Resolutions 92-76, 518-93 and 724-89 do not support the Petitioner's claim to increment or longevity payments. Resolution 92-76 provides certain "Fringe Benefits for Managerial, Elected Officials and Their Deputies, Undersheriff, Temporary and Less Than Full Time Employees." That resolution acknowledged that the county had no formal policy regarding fringe benefits for "Managerial, Elected Officials and their Deputies, Undersheriff, Temporary and less than full time employees" and desired to create a policy. The resolution provides, in pertinent part, the following:

INCREMENTS:

Less than full time employees	None
Temporary employees	None
Managerial (Heads of Departments)	None
Elected Officials' Deputies & Undersheriff	None

HEALTH INSURANCE:

Full time Managerial (Heads of Departments), Elected Officials and their Deputies, and the Undersheriff	100% paid by the County
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Resolutions 518 and 724-89 deal with technical corrections to include certain health insurance benefits to managerial/confidential employees.

Resolution 498-01 is the only resolution dealing with longevity payments. That

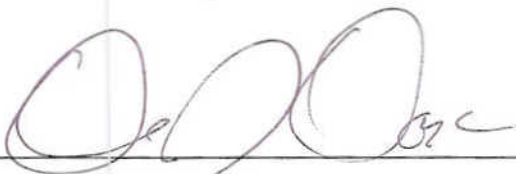
resolution established a longevity payment schedule for “full-time, non-elected County officers and employees not subject to collective bargaining agreements.” The Petitioner in his August 4, 2008 affidavit concedes that this resolution does not apply to him.

Exhibit “B” attached to Petitioner’s August 4, 2008 affidavit is a portion of the county’s policy and procedures manual that appears to summarize resolution 92-76 as modified by resolutions 724-89 and 518-93. As stated above, the portion of the contract referring to increments for managerial (heads of departments), elected officials’ deputies and undersheriff does not apply to the Sheriff. Likewise, the petitioner’s argument that he is a head of department for purpose of these resolutions is unavailing. Although the Sheriff has certain managerial responsibilities, he is an elected public officer. In addition to the clear language of the resolutions, the Court notes that at least one court has opined the position of Sheriff is not comparable to that of a department head or supervisor. Since the Deputy Sheriffs are appointed (See, *Ulster County v. CSEA Unit of Ulster County Sheriff's Dept.*, *Ulster County CSEA Chapter 37* A.D.2d 437, 439 (3<sup>rd</sup> Dept.1971).

For all of the forgoing reasons it is

**ORDERED**, that the Respondent’s motion is granted and the Petition is dismissed.

Dated: July 8, 2009

A handwritten signature in black ink, appearing to read 'D. J. Doyle', is written over a horizontal line.

Hon. Daniel J. Doyle, JSC